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IN THE

Supreme Court of the United States

October Term, 1968

No. 688

UNITED STEELWORKERS OF AMERICA, *Petitioner*,

v.

CCI CORPORATION, A CORPORATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

CHRIS DIXIE
505 Scanlon Building
Houston, Texas 77004
Attorneys for Petitioner.

Of Counsel:

BERNARD KLEIMAN
10 La Salle Street
Chicago, Illinois

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 25, 1968.

OPINIONS BELOW

The District Court did not issue an opinion. Its Findings of Fact and Conclusions of Law are set forth at pp. 35-37 of the record and are reproduced herein for the Court's convenience at Appendix A. The opinion of the Court of Appeals, which is reprinted in Appendix B, is reported in —— F.2d ——, 68 LRRM 2059.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 25, 1968. Thereafter, on June 26, 1968 the Circuit Court of Appeals issued an order denying petitioner's motion for a rehearing. On September 19, 1968 an order extending the time for filing a petition for certiorari

until October 24, 1968 was entered by Mr. Justice Brennan. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a 301 suit, a union's failure to take action, in the face of a spontaneous work stoppage by employees, renders it liable in damages to the employer under a no-strike clause?

2. Whether a staff representative of the International Union has the authority to adopt, ratify or condone a work stoppage and thus render the Union liable in money damages when the International Union Constitution provides that strikes may be called only by the International President, and there is no evidence that he adopted or authorized this strike?

3. Whether the Courts below misconceived the nature and effect of the verbal agreement reached by the parties to bring the strike to a conclusion far in advance of the actual execution of a written contract?

4. Assuming the Union was liable for breach of a no-strike clause, in measuring the damages awarded to the Company should the Court apply the principle of mitigation and find that the Company's loss of profits could have been mitigated extensively merely by scheduling an equivalent number of overtime hours to make up for the production lost during the ephemeral work stoppage?

5. Whether Section 301(c) applies to the authority of a representative at the bargaining table, so as to make a Union responsible for an oral agreement arrived at by its bargaining representative in the face of the Union's Constitution and procedures which require approval and execution of a written agreement by the International officers?

STATUTES INVOLVED

Section 301 of the Labor-Management Relations Act, 1947, 29 USC 185, 61 Stat. 156, provides, in pertinent part, as follows:

Sec. 301 "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF THE CASE

The petitioner, United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Steelworkers" or "the Union") is a labor organization which represents the production and maintenance employees of the respondent, CCI Corporation. CCI, hereinafter referred to as "the Company", is engaged in an industry affecting commerce, and is subject to the Labor-Management Relations Act of 1947.

The Company's employees were confronted with the existence of a Teamster's picket line at the plant gate as they came to work on the morning of January 31, 1956. They refused to cross it. Within 8 hours, however, the Steelworkers' staff representative had taken steps and made entreaties to persuade the employees to return to work. The result of these efforts was not to improve the bargaining relationship between the parties; for regrettably, the Company did not respond with a showing of gratitude, but rather by instituting a suit for money damages for breach of a "no-strike" clause. The Company prevailed below in an amount of over $18,000. The road to this erroneous result is strewn with legal issues worthy of this Court's at-

tention. First, however, we turn our attention to the factual milieu out of which this case arose.

The parties have had a collective bargaining relationship since November 10, 1961, when their first two-year contract became effective. Thereafter, in November, 1963 a second two-year agreement was executed (R. 103-104, 293).[1]

In September, 1965, the Union sent the Company timely written notice of a desire to terminate the existing agreement. Negotiations looking toward a new agreement then took place, but no agreement was reached, and when the contract expired (on November 10, 1965) the employees struck and established a picket line in support of their economic demands (R. 103-105).

One month after the strike began, on December 10, a crucial bargaining session took place in Tulsa, Oklahoma in the presence of a mediator from the Federal Mediation & Conciliation Service (R. 105-106). At that meeting the parties exchanged a series of written proposals and counterproposals, essentially through the services of the mediator, who acted as an intermediary transmitting those writings and the oral representations of the parties as to the meaning they placed on the stated language contained therein (R. 108-109). The parties did not work out precise language covering each of the disputed items, and did not engage in the customary industrial relations practice of "initialing" clauses as agreed upon. Nonetheless, the Union, through its Staff Representative Vanya, advised the Company that its overall economic offer was sufficiently appealing that it should be presented to the membership for consideration (R. 67-68, 162-163, 109).

A Union meeting was then convened, and later that day Vanya telephoned Mr. Fred Monasco, the Company's di-

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[1] Both of those agreements were signed not only by the Union's Staff Representative who negotiated them, but also by the Union's International officers in Pittsburgh, Pa. (R. 293-294).

rector of Industrial Relations, and stated that "he was pulling the pickets" (R. 107). Monasco responded that this was fine, and that he would prepare the agreement for signature and then call Vanya (R. 107-108). The employees returned to work on Monday, December 13, 1965.

About Christmas time, Monasco sent an unsigned draft of the contract to the Union.[2] Vanya was out of town at that time (R. 111-112). After not having received any response from the Union, the Company on January 10, 1966 wrote and requested that the parties get together and execute the agreement. The letter further advised that the Company was applying and administering the contract "as though the formality of signing had already occurred" (R. 136, 302).[3]

The parties did not meet again until the afternoon of January 31, 1966. In the interim, however, at 6:00 a.m. on that same day, the Teamsters Union established a picket line at the Company's premises to advertise its labor dispute with management (R. 120). This dispute was totally unrelated to the aforementioned contract dispute between the Steelworkers and the Company. It did not concern, directly or indirectly, the terms and conditions of employ-

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[2] This draft provided four blank signature lines above the place reserved for the signatures of Vanya and the Local Union committeemen (R. 249, 288). In the 1961 and 1963 agreements these same signature lines were reserved for and utilized by the International Union officers (R. 293-294). It is the International Union's longstanding policy that all bargaining agreements "shall" be signed by the International officers. In support thereof, the Union offered its International Constitution into evidence (R. 304) but the District Court excluded it on the grounds that it was not binding on the Company, essentially because the Union had not given a copy of the document to Company officials in negotiations (R. 210).

[3] On December 13 the Company put into effect an 8 cent wage increase and some inequity adjustments (R. 115), and on January 1, 1966 the Company began making contributions for the group insurance policy covering dependents of employees (R. 113).

ment of the production workers in the bargaining unit represented by the Steelworkers.

Nevertheless, 180 of these 187 workers respected the Teamsters' picket line on that morning. Commencing at 6:00 a.m. they stood across the street from the plant, choosing not to cross the Teamsters' picket line and go to work (R. 120). Company official Monasco made several loudspeaker announcements advising the employees that there was a contract in force, and the no-strike clause[4] precluded the employees "from honoring the picket line of another union" (R. 120).

Several employees then asked staff representative Vanya, who arrived at the plant area about 6:30 a.m. and remained until 8:30 or 9:00 a.m., if the contract was signed. Vanya answered "no." Some employees also asked if they were obliged to cross the picket line. Vanya in good faith believed that no binding contract was then in effect, accordingly, he replied "this is up to you as an individual" (R. 153). Except for this response, there is no evidence that Vanya actively sought out any employees and/or urged them not to cross the picket line. Although the International Constitution of the Steelworkers provides that no strike shall be called without approval of the International President (see Article XVI of petitioner's rejected Exh. 3, R. 304) there is not one iota of evidence to so much as suggest that the International President even knew about—let alone authorized—this work stoppage.

At 1:00 p.m. that afternoon, the Company and Union negotiating committees met in Vanya's office. The parties discussed several substantive issues (including job posting and filling provisions, shift preference, and the question whether the strike period would count toward an employee's probationary period) which remained unresolved

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[4] The no-strike clause is quoted verbatim in the opinion of the Court of Appeals at Appendix B, p. 8, n. 4.

from the earlier negotiations (R. 123-125, 164-166). After the parties reached agreement on the meaning to attribute to the language contained in the written drafts, they each signed six copies of the agreement which the Company had brought to the meeting (R. 167, 191).

The Company then requested the Union representatives to inform the men that the contract had been signed, and that they should return to work (R. 73). Vanya told Monasco that he would call a special meeting to advise the employees accordingly. The Union, as it had promised, first convened such a meeting and then staff representative Vanya made two trips to the picket line and advised the employees that a contract had been signed and they should go back to work. The second shift worked as usual on the afternoon of January 31.

The conduct of the Company officials, however, stands in marked contrast. After having obtained the Union's pledge of cooperation, they proceeded directly to their attorney's office where they master-minded the instant suit for breach of contract, which was filed that same day (R. 142).

The District Court issued its Findings of Fact and Conclusions of Law on March 18, 1967. The Court found that an oral agreement was entered into on December 10, 1965, that the parties intended it to be effective immediately, even though they contemplated that it would ultimately be reduced to writing, and that, in fact, the actual written agreement executed on January 31, 1966 was intended simply as a convenient record of their oral agreement. Second, the District Court found, merely based upon Vanya's above-quoted responsive statement to some workers near the Teamster's picket line on the morning of January 31, that the Union made no effort to prevent or end the work stoppage, but instead "participated in, encouraged, condoned and authorized the work stoppage"

(R. 36) and thus was responsible for a breach of the no-strike provision of the oral contract.

Finally, the District Court awarded the Company $18,824.51 in damages for this most ephemeral work stoppage, which admittedly lasted for only one shift. This award, in turn, consisted of three items: loss of profits resulting exclusively from the loss of production during the mentioned one-shift work stoppage, plus certain unabsorbed manufacturing and administrative expenses. After the trial, petitioner moved under Rule 59 (a) and (e) of the Federal Rules of Civil Procedure for reformation of the award and/or reopening the record to prove that the Company could have mitigated its damages to a major extent, simply by scheduling overtime to make up for the production loss during the one-shift stoppage. The District Court, however, denied this motion (R. 39, 41).

On appeal the Court of Appeals affirmed the judgment and underlying rationale of the District Court. See Appendix B, *infra*. Most noteworthy was the Court's conclusion (at pp. 8-9) that "the inculpation of the Steelworkers Union [for the work stoppage] . . . [is] . . . clear"—a conclusion which was predicated exclusively on two facts: 1.) that staff representative Vanya at the outset of the work stoppage on January 31 responded to the inquiry of some employees by stating that it was up to them as individuals as to whether or not they wanted to cross the Teamsters' picket line; and 2.) that later that same day "Vanya told the second shift to report in, and then the men followed his instructions."

REASONS FOR GRANTING THE WRIT

1. There is a conflict between the decision of the Tenth Circuit in this case, and the decision of the Court of Appeals for the Fourth Circuit in *United Construction Workers* v. *Haislip Baking Company,* 223 F.2d 872 (1955), cert. denied 350 U.S. 847. Both cases raise a significant issue of

federal law—whether, in a 301 suit, a union can be held liable in money damages for breach of a no-strike clause because its representative takes no affirmative action in response to a work stoppage which occurs without union instigation.

Directing its attention to this precise issue, the Fourth Circuit stated (*Id.* at 877-878):

> "We have never held, however, that there is any responsibility on the part of a union for a strike with which it has nothing to do; and there manifestly is no such liability. If Morris and Belcher [International Union Staff Representatives] had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did."

In our view, *Haislip* states the proper legal test of union liability under the typical no-strike clause, such as present here. Accord: Cox, *Some Aspects of the Labor-Management Relations Act, 1947,* 61 Har. L. Rev. 274, 311-312 (1948); Gould, *The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act,* 52 Cornell L.Q. 672, 700-702 (1967). That analysis, however, stands in marked contrast to the instant opinion of the Tenth Circuit. For here, stated simply, the Union's liability rested on staff representative Vanya's initial failure to take affirmative action, coupled with the fact that he thereafter played an active role in bringing the stoppage to a halt—approxi-

mately eight hours after its inception. According to the Tenth Circuit, the combined effect of these factors justified imposing upon the Union full responsibility for the damages suffered by the Company on the theory that the walkout was the the product of Union action *ab initio*.

This fallacious reasoning is precisely that which the Fourth Circuit rejected in *Haislip* (see above quote) on the grounds that no liability could be imposed upon the union either for silence or mere inaction in the face of a walkout with which it had nothing to do, or for ultimately taking some but not all steps possible to end the stoppage.[5]

Indeed, the logic of the *Haislip* approach is most compelling here, since the work stoppage arose out of a situation—the employees' refusal to cross a Teamsters' Union picket line—which manifestly was unconnected with any economic demand, contractual grievance or other subject of direct interest to the Steelworkers as bargaining agent of the Company's production employees.[6]

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[5] Compare *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 736-739 (1966).

[6] In this connection, the opinion of distinguished Arbitrator Harry Platt in *Booth Newspapers, Inc.*, 43 Labor Arbitration Reports 785 (1964) is especially apropos. There, in denying the Company's grievance for money damages alleging that certain craft unions had engaged in conduct violative of a no-strike clause because its members had refused to cross the picket line of another union, the Arbitrator held (Id. at 790): "Generally speaking, mass action of the kind involved here is at best only prima facie evidence of Union participation or direction rebuttable by a showing that the action was in fact voluntary. . . . It is notable that at the time of the refusal to cross the janitors' picket line there was no dispute in existence between the craft unions and the Publisher, no outstanding union demands for improvement in contract terms or working conditions, no threats of economic pressure or reprisal by the unions as a means of gaining additional benefits, and no grievance which required processing in the grievance procedure. Viewed realistically, the members' refusal to cross the janitor picket line on July 25 was their own individual reaction to a condition which occurred outside the collective bargaining Agreement. It clearly was not action of the craft unions in support of their own interests . . ."

Nor does this conflict in decisions relate to an inconsequential problem. Quite the contrary: the fact is that no-strike clauses are present in one form or another in virtually every collective bargaining agreement executed today. See BNA, Union Liability for Strikes, Collective Bargaining Negotiations and Contracts (1963). The no-strike clause is an integral element of and comports with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare. See, for example, *United Steelworkers of America* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582-583 (1960); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 454-457 (1957). As such, this Court has deemed such clauses to be the *quid pro quo* for a grievance arbitration clause, and has gone so far as to read binding no-strike clauses into any contract which contains such a procedure. *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 104-106 (1962).

But while no-strike clauses surely have contributed mightily to industrial stability, it cannot be gainsaid that there have been, and undoubtedly will continue to be numerous occasions in which individual employees or groups thereof decide to take matters into their own hands and resort to unauthorized or so-called "wildcat strikes" during the course of the contract term. Gould, *The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act, supra,* 52 Cornell L.Q. at 673.

Indeed, wildcat strikes are a widespread phenomenon of the industrial scene, and under most contracts individual employees are subject to disciplinary action at the hands of management for such unauthorized conduct. *NLRB* v. *Rockaway News Supply Company,* 345 U.S. 71, 80 (1953). However, employers have not been totally content with this form of relief, and have sought instead with increasing frequency to place the responsibility for such conduct on the unions in an effort, *inter alia,* to recoup the financial losses, if any, flowing from such work stoppages. See, for example,

Lewis v. *Benedict Coal Corp.*, 259 F.2d 346 (6th Cir., 1958); *Garmeda Coal Company* v. *International Union of Mine Workers*, 230 F.2d 945 (6th Cir., 1956); *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 205 F.2d 376 (8th Cir., 1953); *Structural Steel Association* v. *Shopmen's Union*, 172 F. Supp. 358 (D.C.N.J. 1959).[7]

Precisely because unions face the prospect of being subjected to serious financial losses by errant court opinions such as that under consideration here, it is essential that the nature and extent of union liability under typical no-strike clauses be clarified once and for all.[8]

In *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U. S. at 456, this Court approved the doctrine that Section 301 required the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective bargaining agreements. At the foundation of this doctrine was the recognition that the subject matter of 301 actions "is peculiarly one that calls for uniform law." *Local 174 Teamsters* v. *Lucas Flour Company*, *supra*, 369 U.S. at 103.

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[7] In addition, allegations of a breach of a no strike clause may be processed to arbitration under many collective bargaining agreements. It is interesting to note, moreover, that there appears to be a conflict among the arbitrators as to the precise nature of the union's obligation under such causes. Compare, for example, *Bradlees Family Circle Stores*, 47 Labor Arbitration Reports 567 (1966), and *Booth Newspapers, Inc.*, *supra*. See also, for example, *Metro East Journal*, 47 Labor Arbitration Reports 610 (1966); *Crawford Clothes*, 12 Labor Arbitration Reports 1104 (1949); *Merchants Frozen Food Division*, 34 Labor Arbitration Reports 607 (1960).

[8] Cf *UMW* v. *Gibbs*, *supra*, where the court held that clear and convincing proof that the Union authorized, participated in or ratified individual employee action is a necessary prerequisite to holding the Union liable in money damages for tortious acts committed when no contract is in effect. See, Sec. 6 of the Norris-La Guardia Act, 47 Stat. 71, 29 U.S.C. Sec. 106.

Without wishing to belabor the obvious, the existing conflict in circuits as to the nature of the union's liability under a no-strike clause seriously undermines the very principle upon which the *Steelworkers Trilogy, Dowd Box*[9] and *Lucas Flour, supra,* were premised—namely, that there should be a uniform federal policy for the enforcement of collective bargaining agreements equally applicable in all forums.

Moreover, as we have shown, even apart from the conflict between the Fourth and Tenth Circuits, it is clear that the instant case presents important questions of federal law which have not been, but should be, settled by this Court.

2. There is a direct conflict between the Fourth Circuit's *Haislip* ruling and the instant decision on a second significant issue: namely, whether a union staff representative has the authority to adopt, ratify or condone a work stoppage which was unauthorized from its inception, and thereby render the labor organization liable for breach of contract. In *Haislip* the Court stated (223 F.2d at 878):

> "We think, also, that there is no showing of either express or implied authority on the part of either Morris or Belcher to adopt on the part of defendants a 'wild cat' strike of this character. It must be borne in mind that the strike did not arise out of organizational or other activities in which defendants had an interest and in which their representatives might be held to have implied authority to participate in protection of that interest. Cf. *United Mine Workers of America* v. *Patton,* 4th Cir., 211 F.2d 742. It arose out of a grievance having no relation to organization or the interests of the defendants. It

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[9] *Dowd Box Co.* v. *Courtney,* 368 U.S. 502 (1962).

> is hardly conceivable that authority to adopt, to participate in or to encourage such strikes, which are clearly inimical to the interests of a union, should be vested in field officers or regional directors."

This rationale is squarely on point here. Without question, the Steelworkers Union would have no direct interest in encouraging its members to ignore the no-strike provision of its contract by refusing to cross a picket line established by another union. More importantly, we need not *speculate* as to whether calling of such a work stoppage was within the authority of the Steelworkers staff representative on the scene. Under the International Constitution of the Steelworkers Union, no strike may be called except by the International President, (See petitioner's Exhibit 3 at Article XVI, which was rejected by the District Court; R. 304).

The Tenth Circuit, however, disregarded the *Haislip* approach and reached a result directly contrary. It found the Union liable for breach of the no-strike clause based upon the theory that staff representative Vanya had apparent authority to initiate or ratify the stoppage even though the International officers had not authorized him to do so. To resolve this supplemental conflict, certiorari should be granted here.[10]

3. This case poses an important question under Section 301 relating to the status of parties who have reached a

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[10] In addition to the liability issues discussed above, the instant case poses several significant and novel questions concerning the proper measure of damages which should be assessed, assuming there is liability. Of particular note is the Union's contention, rejected below, that since the stoppage admittedly only caused the Company to lose 8 hours of production, it was obligated to mitigate its damages by scheduling an equivalent amount of overtime to make up for the lost production.

"handshake deal" to terminate a strike but have not yet completed the formidable task of reducing the agreement to writing. Inextricably interwoven in the question whether the Union is responsible for the instant work stoppage is the underlying issue whether or not a binding oral agreement was in effect when the stoppage occurred on the morning of January 31, 1966. There can be no doubt but that the federal labor policy proceeds on the assumption that negotiations between labor and management will culminate in written contracts. Section 8(a)(5) and 8(d) of the National Labor Relations Act, 29 USC 158(a) and (d); Section 104, Labor Management Reporting and Disclosure Act, 29 USC 414. Indeed, it is an unfair labor practice for a party to refuse to reduce an oral agreement to writing.

The practical reasons for requiring a written instrument are readily understandable. Collective bargaining customarily results in a very comprehensive and detailed agreement relating to a myriad of terms and conditions of employment. *Steelworkers* v. *Warrior & Gulf Co., supra,* 363 U. S. at 578-579. Because of this fact, so-called oral understandings offer a totally infeasible method for conducting labor relations, and inevitably invite and spawn misunderstandings. Conversely, the single best way to eliminate ambiguity and uncertainty, and thus reduce the potential for disputes between the parties, is to insist that written agreements be consummated.

This is not to overlook the fact that, as several Circuit Courts of Appeals have recognized, there may be certain extraordinary circumstances where the parties orally agree to binding contractual terms effective immediately, even though they contemplate reducing said agreements to writing at a subsequent time. See, for example, *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers,* 341, F.2d 482, 486 (2nd Cir., 1965); *Roadway Express, Inc.* v. *Teamsters,* 330 F.2d 859, 863 (3rd Cir., 1964).

The Tenth Circuit here concluded that this was one such instance, and that the parties entered into a binding verbal agreement on December 10, 1965. But what the Court failed to recognize, however, is that the parties had *not* reconciled all their differences, and completely settled all their contract terms on December 10. Indeed, the very nature of the bargaining session on that date—i.e., a mediator was used not only as an intermediary for the exchange of extensive proposals and counter-proposals, but also to transmit the construction which the parties placed on their respective written documents—emphasizes that it was highly unlikely that any all-encompassing agreement could have been reached.

A more realistic interpretation of what transpired was that the Union was most anxious to terminate the strike which was tnen in its 30th day; that Union negotiators felt that the Company's economic offer was sufficiently adequate to justify submitting it to the membership; that when the membership voted to accept this offer and the Union advised the Company it had "an agreement," this meant only that there was to be an interim "truce," during which the employees returned to work and the Company implemented the agreed-upon economic improvements pending the execution of a written contract.

However, as to the non-economic issues, there was no final agreement until the language was approved and the contract executed on the afternoon of January 31, 1966. Indeed, this was manifest from the conduct of the parties themselves. First, during the one-hour meeting which preceded formal execution of the written agreement, the parties discussed at length the interpretation of certain contract provisions relating, *inter alia,* to job posting and scheduling. Only after the parties agreed upon a mutually satisfactory interpretation, was the agreement executed.

Second, Vanya's conduct at the picket line on January 30 can best be explained by the fact that in the morning the contract had not yet been signed, and, understandably, he was of the view that there was no binding contract in effect, whereas once the contract was executed in the afternoon, and the no-strike clause went into effect, he promptly urged the employees to halt their work stoppage.

In these circumstances, it is clear that the Court of Appeals totally misconceived the nature of the verbal agreement which ended the strike. Further, the Court compounded its error by holding that the Union staff representative had apparent authority to enter into this verbal agreement, notwithstanding the Union's known policy requiring approval by its International officers of all collective bargaining agreements. There is nothing in the language or the legislative history of Section 301(e) which would dictate the conclusion that Congress intended that a union could be found to have *executed* a contract, even if not executed by an individual with "actual authority" or "subsequently ratified" by a duly authorized official.

Section 301(e) relates to the circumstances by which a party becomes "responsible" for the acts of another. But the Court below erroneously applied Section 301(e) to establish bargaining authority in Vanya to enter into a binding oral agreement contrary to the Union Constitution. This declared "apparent authority" stemmed, of course, from the act of sending Vanya to the bargaining table which the Union was required to do by Section 8(b)(3) and 8(d) of the Act. Section 301(e) is thus used backwards and creates massive administrative problems for a Union such as this petitioner with a multitude of contracts throughout the nation—each of which may thus become orally binding without knowledge or approval of the designated Union officers.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
CHRIS DIXIE
505 Scanlon Building
Houston, Texas 77004
Attorneys for Petitioner.

Of Counsel:
BERNARD KLEIMAN
10 La Salle Street
Chicago, Illinois

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 6365—Civil—Filed March 21, 1967

NOBLE C. HOOD
Clerk, U. S. District Court

CCI CORPORATION, a corporation, *Plaintiff*,

vs.

UNITED STEELWORKERS OF AMERICA, *Defendant*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been carefully considered by the Court upon the pleadings, evidence presented by both the Plaintiff and Defendant, and briefs of counsel, the Plaintiff herein being represented by its attorney Carl D. Hall, Jr., and the Defendant being represented by its attorneys Maynard Ungerman and Chris Dixie; the Court herewith enters its finds of fact and conclusions of law.

FINDINGS OF FACT

1. On December 10, 1965, Plaintiff and Defendant entered into an oral collective bargaining contract, providing for wages, hours and other working conditions. This contract was in full force and effect on January 31, 1966.

2. On January 31, 1966, and prior to the filing of this action, Plaintiff and Defendant reduced their agreement of December 10, 1965, to writing and executed the same.

3. The agreement entered into on December 10, 1965, between Plaintiff and Defendant provided that there would be no work stoppage.

4. Plaintiff was never informed by the Defendant of any need or requirement for approval of the contract by the international officers of the Defendant.

5. Defendant led Plaintiff to believe and to understand and to know, on December 10, 1965, that an agreement had been reached between Plaintiff and Defendant and that no further action or ratification of the contract was necessary.

6. It was not necessary and it was not a part of the agreement between Plaintiff and Defendant to wait for the international officers of the Defendant to approve the agreement, and this matter was never discussed by any of the parties and was not in the contemplation of the parties.

7. It was the intention of the Plaintiff and Defendant in entering into the agreement on December 10, 1965, that the same should become effective immediately and its provisions and benefits put into effect immediately.

8. The written Agreement executed on January 31, 1966, was intended by the parties merely as a convenient record of their previous contract entered into on December 10, 1965.

9. Although 187 employees represented by the Defendant were scheduled to work the first shift on January 31, 1966, only 7 men reported for work.

10. The Defendant, although fully aware of the work stoppage on January 31, 1966, made no effort to prevent or end same.

11. The Defendant, acting through its agents and employees, participated in, encouraged, condoned and authorized the work stoppage on January 31, 1966.

12. As a result of the work stoppage on January 31, 1966, Plaintiff sustained a loss in the amount of $18,824.51, which consisted of loss of profits in the amount of $5,725.02, unabsorbed manufacturing expenses in the amount of $8,111.87, and unabsorbed administrative expenses in the amount of $4,983.62.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of this case by virtue of the provisions of 28 USC § 1337 and 29 USC § 185.

2. At all times relevant to this controversy, Plaintiff was an employer within the meaning of § 301 of the Labor Management Relations Act of 1947, 29 USC § 185.

3. At all times relevant to this controversy, Plaintiff was engaged in commerce within the meaning of Section 2, paragraph 6 of the Labor Management Relations Act of 1947, 29 USC § 152(6).

4. At all times relevant to this controversy the Defendant was a labor organization representing employees in an industry affecting commerce as defined in Section 2, paragraph 5 of the Labor Management Relations Act of 1947, 29 USC § 152(5), and its officers and agents are engaged in representing and acting for employee members of the said union within the United States Judicial District for the Northern District of Oklahoma.

5. Defendant's action in participating in, encouraging, condoning and authorizing the work stoppage of January 31, 1966, constituted a breach of the contract of December 10, 1965, for which Defendant is liable for damages.

6. Recovery by the Plaintiff in this action is not barred under the provisions of 15 Okl. St. 136, for the reason that the agreement of December 10, 1965, was reduced to writing and signed by the Defendant prior to the filing of this action.

7. Plaintiff is entitled to judgment for $18,824.51, plus 6% interest as allowed by law, together with its costs.

March 18, 1967

LUTHER BOHANON
United States District Judge

Approved as to form
HALL & SUBLETT
By CARL D. HALL, JR., *Attorney for Plaintiff*
UNGERMAN, GRABEL, UNGERMAN & LEITER
By MAYNARD I. UNGERMAN, *Attorney for Defendant*

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED—United States Court of Appeals—Tenth Circuit
April 25, 1968, William L. Whittaker, *Clerk*

March Term, 1968

No. 9629

UNITED STEELWORKERS OF AMERICA, *Appellant*,

v.

CCI CORPORATION, a corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Chris Dixie (Maynard Ungerman and Bernard Kleiman were with him on the brief) for Appellant.

Carl D. Hall, Jr. of Hall & Sublett for Appellee.

Before LEWIS and HILL, Circuit Judges, and CHRISTENSEN, District Judge.

LEWIS, Circuit Judge.

Finding that the appellee-plaintiff, CCI, had been damaged in the amount of $18,824.51 through breach of its collective bargaining contract by appellant-defendant, Steelworkers, the District Court for the Northern District of Oklahoma entered judgment accordingly pursuant to jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The Steelworkers appeal, contending that the trial court erred in finding that a binding contract existed between the parties; erred in finding

that any such contract was breached; and erred by applying an improper measure of damages.

The Steelworkers had represented CCI's production employees continuously since the execution of an initial collective bargaining agreement in 1961. The contract was renewed in 1963 for a two-year period expiring on November 11, 1965, but negotiations for a further renewal of the contract between the parties broke down and at midnight November 10, 1965, the Steelworkers struck and established a picket line. One month later, on December 10, the parties met and completely settled their dispute, reaching, according to the testimony of both the negotiator for CCI and the representative of the Steelworkers, a recognized verbal agreement. The threshold question presented to the trial court was whether the parties intended the verbal agreement to be immediately effective and binding or whether the contract was not intended to be enforceable until its terms were embodied in a signed written contract. Subjective or mutual intent is a question of fact to be determined from all probative circumstances and, since the trial court found that the parties intended to be bound by the oral contract, the threshold appellate question is whether such finding is clearly erroneous. Rule 52(a), Fed. R. Civ. P. We hold the finding to be amply supported by the evidence.

We readily recognize, as union counsel argues, that labor contract negotiation bears the coercion of statute, that negotiators often give and take on minor issues to supply the required continuity of bargaining and anticipatory to the main issues, and that it would indeed frustrate collective bargaining if the law silently closed a deal while the negotiator was angling for some other point. But collective bargaining, while it has distinctive considerations, is premised upon good faith not only at the bargaining table but, in the full contemplation of the Act, in the commitments there made, relied on by the parties and acted upon

by them. Thus, when bargaining is terminated and an agreement reached, the *intent* of the parties may be tested by the application of classic contract law, a principle recognized by the National Labor Relations Board in considering a § 8(a)5 violation for refusal to sign an agreed verbal contract. In the case at bar, the actions and statements of both parties point to the existence of a binding verbal contract.

After the December 10 meeting, in the late afternoon, Mr. Vanya, the Steelworkers' representative, called Mr. Monasco, the CCI representative, and told him, "We have an agreement. The employees have accepted it. I am pulling the pickets." This was done. On Monday, December 13, the employees returned to work and CCI effectuated the wage increases and all bargained-for modifications. Later in December CCI submitted to the Steelworkers a written contract for signatures containing the continuing provisions of the 1963 contract and employing the language agreed to at the bargaining table to the extent the basic contract was changed.

When the union failed to respond to the draft tendered to it by the company in December, CCI, on January 10, 1966, sent to the Steelworkers a letter requesting that the parties get together to sign the contract so it could be printed and distributed to the employees. The letter advised the union that CCI was administering and applying the terms and conditions agreed upon during negotiations and would continue to do so "as though the formality of signing had already occurred." The union asserts that this is inconsistent with the CCI's position that the oral contract was binding, but the contrary appears to us to be a more logical interpretation. What it serves to emphasize is that signing was a mere formality and not determinative of the existence of a binding agreement. CCI's conduct as well as its assertions is consistent with this position. The contract was signed, without change, on January 31, 1966,

dated and specifying its effectiveness to be December 10, 1965.

There was also evidence that the Steelworkers considered the oral agreement binding. On February 25, 1966, union representative Vanya signed and filed a grievance on behalf of an employee alleging a violation of the new agreement arising out of a January 3 occurrence—this of course being prior to the actual signing.

We are not now confronted with a case where "no one really believed the parties would be bound until the contracts were fully executed and delivered," *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers,* etc., 2 Cir., 341 F2 482, 486, or where there has been an agreement on "principle" only with the written form to follow. 341 F2 at 486. We have, rather, an earlier basic written contract, modified in part by complete verbal understanding and later signed in accord with such understanding, and acted upon by both parties as if immediately effective upon verbal agreement. Although a written contract was contemplated,[1] the trial court was not clearly erroneous in holding that a binding verbal contract was intended by the parties pending a written formalization of their agreement.

The Steelworkers further contend that no valid verbal contract was existent because its representative, Vanya,

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[1] Note the old but oft-cited language from the case of *Mississippi & Dominion S. S. Co.* v. *Swift,* 86 Me. 248, 258-59, 29 Atl. 1063, 1067, (1894), to the effect that in making a judgment about *intent* to be bound by an oral contract ". . . several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing, whether it is of such nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

lacked authority under provisions of the Steelworkers Constitution to finalize an agreement.

In enacting the Labor Management Relations Act of 1947, Congress provided that the actual fact of authorization or subsequent ratification would not be controlling of agency questions.[2] This has been properly construed as opening the way for application of general rules of agency and particularly the rules of apparent authority. *International L. & W. Union* v. *Hawaiian Pineapple Co.*, 7 Cir., 226 F2 875, 880.[3] The trial court found that Vanya had apparent authority. The finding is supported in the evidence. Monasco testified that the international officers of the union had never signed the company's agreements and that at no time was the company informed that approval of the international officers was necessary or that any additional action had to be taken by the international union prior to the agreement's becoming effective. Representative Vanya's conduct and handling of negotiations gave every indication of authority.

The parties' contract in each of the years 1961, 1963 and 1965 contained a no strike-no lockout provision.[4] On Jan-

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[2] § 301 (e) of the Act, 29 U.S.C. § 185, provides:

"For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[3] *See also* Sunset Line & Twine Co., 79 N.L.R.B. 1487, interpreting an identical provision from 29 U.S.C. § 152(13).

[4] "The Union agrees that neither it nor any of the employees in the bargaining unit covered by this Agreement will collectively, concertedly or individually engage in or participate, directly or indirectly, in any strike, slow-down, stoppage, or other interference of production or work during the term of this Agreement; and the Company agrees that during the term of this Agreement, it will not lock out any of the employees covered by this Agreement. The Company retains the right to discipline or discharge any employee who violates this provision."

uary 28, 1966, CCI was struck and picketed by the Teamsters' Union. On January 31 the first shift of the Steelworkers, due in at 6:00 a.m., refused to cross the picket line although urged to do so by company officials by announcement over the public address system that they, the employees, had a contractual duty to do so. Vanya and his negotiating committee were present at the scene and Vanya, when asked by individual Steelworkers as to what to do replied, "This is up to you as an individual." As a result seven men reported for work, one hundred and eighty did not.

Although the Steelworkers disavow any union responsibility for the actions of its members we find no merit to the contention. The refusal to cross the Teamsters' line was clearly a breach of contract, *NLRB* v. *Rockaway News Supply Co.,* 345U. S. 71, and by no stretch of the imagination could the action be termed a wildcat. Vanya told the second shift to report in and the men followed his instructions. We hold the inculpation of the Steelworkers' Union to be clear.

Finally it is contended that the court erred in the determination of damages. The assessment of $18,824.51 totals from loss of profits in the amount of $5,729.02, unabsorbed manufacturing expenses in the amount of $8,111.87, and unabsorbed administrative expenses in the amount of $4,983.62. These findings were based upon documentary evidence and the testimony of W. T. O'Shields, Vice President of Manufacturing for the company, and Wayne Harpster, a Certified Public Accountant of the firm which had been auditing the company's books for the preceding three years. The Steelworkers introduced no evidence either to contravert the plaintiff's damage claim or to assist the court in making the assessment. The damages consisting of loss of profits plus standby overhead expenses—herein referred to as unabsorbed manufacturing and administrative expenses—while having elements of specula-

tiveness, are nonetheless recoverable, *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 8 Cir., 205 F2, 376, where, as here, the elements were proved by competent evidence. And although counsel now attacks with vigor the conclusionary opinions of the expert accountant the appellate contention is subject to the same criticism that is leveled at the witness's conclusions—that of speculation. We cannot say as a matter of law that the trial court erred in accepting the testimony of the expert as credible and accurate when that court was unaided by the introduction of conflicting or disputing evidence.

By motion for new trial made under Rule 59, Fed. R. Civ. P., and for the first time, claim was made that CCI could have mitigated its damage by scheduling overtime to make up for lost production. The contention is extended to appellate argument. Admittedly, additional evidence would be required to premise any validity the claim might have. It seems sufficient to say that such a theory should have been offered and supported at trial and not after judgment nor in this court.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Received March 22, 1967

No. 6365—Civil

Filed March 21, 1967

Noble C. Hood, *Clerk, U. S. District Court*

CCI CORPORATION, a corporation, *Plaintiff*,

v.

UNITED STEELWORKERS OF AMERICA, *Defendant.*

JUDGMENT

This action came on for trial before the Court, Honorable Luther Bohanan, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, CCI Corporation, recover of the defendant United Steelworkers of America, the sum of $18,824.51, with interest thereon at the rate of 6% as provided by law, and its costs of action.

DATED at Oklahoma City, Oklahoma, this 18th day of March, 1967.

LUTHER BOHANAN
United States District Judge

Approved as to form

HALL & SUBLETT, *Attorneys for Plaintiff*
By CARL D. HALL, JR.
UNGERMAN, GRABEL, UNGERMAN & LEITER, *Attorneys for Defendant*
By MAYNARD I. UNGERMAN